

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN MARSHALL EVERETT, PAMELA A.
KRAMER, and WALTER W. LAWRENCE, on
Behalf of Themselves and all Other Similarly
Situating,

Plaintiffs,

v.

MICHAEL BOZIC, EDWIN J. GARN, WAYNE
E. HEDIEN, DR. MANUEL H. JOHNSON,
JOSEPH J. KEARNS, MICHAEL E. NUGENT,
FERGUS REID, CHARLES A. FIUMEFREDDO,
JAMES F. HIGGINS, MORGAN STANLEY
DEAN WITTER & CO., INC., MORGAN
STANLEY INVESTMENT ADVISORS, and
JOHN DOES No. 1 through 100,

Defendants.

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05 CV 00296 (DAB)

ECF CASE

ORAL ARGUMENT REQUESTED

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE
INDEPENDENT TRUSTEE DEFENDANTS' MOTION TO DISMISS**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| JOHN MARSHALL EVERETT, PAMELA A. | : | |
| KRAMER, and WALTER W. LAWRENCE, on | : | |
| Behalf of Themselves and all Other Similarly | : | |
| Situated, | : | |
| | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | 05 CV 00296 (DAB) |
| | : | ECF CASE |
| MICHAEL BOZIC, EDWIN J. GARN, WAYNE E. | : | |
| HEDIEN, DR. MANUEL H. JOHNSON, JOSEPH | : | ORAL ARGUMENT REQUESTED |
| J. KEARNS, MICHAEL E. NUGENT, FERGUS | : | |
| REID, CHARLES A. FIUMEFREDDO, JAMES F. | : | |
| HIGGINS, MORGAN STANLEY DEAN WITTER | : | |
| & CO., INC., MORGAN STANLEY | : | |
| INVESTMENT ADVISORS, and JOHN DOES No. | : | |
| 1 through 100, | : | |
| | : | |
| Defendants. | : | |
| | : | |
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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE
INDEPENDENT TRUSTEE DEFENDANTS' MOTION TO DISMISS**

Defendants Michael Bozic, Edwin Garn, Wayne Hedien, Dr. Manuel Johnson, Joseph Kearns, Michael Nugent and Fergus Reid (collectively, the "Independent Trustees"), submit this reply memorandum of law in further support of their motion to dismiss the Complaint in this action. The Independent Trustees also join in and incorporate by reference, to the extent applicable, the arguments set forth in the reply memoranda of law filed by the institutional defendants (the "Morgan Stanley Motion") and by the other trustees defendants (the "Fiumefreddo/Higgins Motion").

ARGUMENT

Although styled as a “a memorandum of law in opposition to the Independent Trustees’ Motion to Dismiss,” plaintiffs’ memorandum merely incorporates by reference the arguments it raised in opposition to the *Morgan Stanley Defendants’* Motion to Dismiss and neither opposes nor responds to the additional argument separately raised by the Independent Trustees in their motion to dismiss. There is no basis for plaintiffs’ assertion that “the Independent Trustees make no substantive argument not included in the Morgan Stanley Motion to Dismiss.” Pls. Mem. at 1-2.

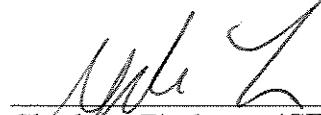
Protection under the business judgment rule is available only to the trustee defendant and, therefore, was *not* included in the brief filed by the Morgan Stanley defendants. As discussed more fully in our opening brief, the business judgment rule requires dismissal of negligence and breach of fiduciary duty claims absent, as here, evidence of self-dealing or gross negligence by a director defendant. For this reason and because the plaintiffs have not challenged the applicability of the business judgment rule, all of the claims asserted against the Independent Directors should be dismissed.

CONCLUSION

WHEREFORE, for the above-stated reasons and for the reasons set forth in the Morgan Stanley Motion and the Fiumefreddo/Higgins Motion, the Independent Trustees respectfully request that this Court enter an order dismissing with prejudice, all of the claims asserted against them.

Dated: New York, New York
July 6, 2005

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